

Supreme Court, U. S.

FILED

JAN 7 1976

MICHAEL ROYAK, JR., CLERK

IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1975

No. 75-813

FRITHJOF O. M. WESTBY, Individually and as Secretary of the South Dakota Department of Social Services, and VERN WOODARD, Individually and as Director of the South Dakota Division of Social Welfare,  
Appellants,

v.

JANE DOE, on Behalf of Herself and All Others  
Similarly Situated,  
Appellees.

On Appeal from the United States District Court for the  
District of South Dakota

**MOTION TO AFFIRM**  
and  
**BRIEF IN SUPPORT OF MOTION**

MICHAEL A. WOLFF

Black Hills Legal Services

714 Fourth Street

Rapid City, South Dakota 57701

PATRICIA BUTLER

National Health Law Program

10995 LeConte Avenue

Los Angeles, California 90024

Attorneys for Appellee

January 5, 1976

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On Appeal from the United States District Court for the  
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**MOTION TO AFFIRM**

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Plaintiff-appellee Jane Doe moves this Court for its order  
summarily affirming the judgment of the three-judge district.

As grounds for such motion, and as more fully set forth  
in the brief herein, it is manifest that the questions on which

the decision of the cause depends are so unsubstantial as not  
\* to need further argument and, specifically, the district court's  
constitutional decision is fully controlled by recent unequivocal  
decisions of this Court.

Respectfully submitted,

MICHAEL A. WOLFF  
Black Hills Legal Services  
714 4th Street  
Rapid City, S. D. 57701

PATRICIA BUTLER  
National Health Law Program  
10995 LeConte Avenue  
Los Angeles, Cal. 90024  
Attorneys for Appellee

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On Appeal from the United States District Court for the  
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**BRIEF IN SUPPORT OF MOTION TO AFFIRM**

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**I. QUESTIONS PRESENTED**

A. Whether Title XIX of the Social Security Act, 42 U.S.C.  
1396 *et seq.*, under which defendant-appellants administer the  
federal-state Medicaid program in South Dakota, requires  
payment for lawful nontherapeutic abortions.

B. Whether the South Dakota Medicaid regulations, administered by defendant-appellants, violate the equal protection clause of the Fourteenth Amendment to the United States Constitution, where such regulations provide full payment for medical care for eligible pregnant women who carry their pregnancies to term or whose pregnancies are terminated for therapeutic reasons, and deny medical payments for eligible women who choose lawful nontherapeutic abortions.

## II. STATEMENT OF THE CASE

### A. Decision Below

On April 19, 1974, appellee Jane Doe commenced this action challenging the regulation and policy of the State of South Dakota that deny payment for lawful nontherapeutic abortions under the federal-state Medicaid program administered by defendant-appellants. Plaintiff-appellee asserted that the challenged regulation and policy violate Title XIX of the Social Security Act, 42 U.S.C. 1396 *et seq.* (the federal Medicaid statute), and the equal protection clause of the Fourteenth Amendment.

The three-judge district court, convened pursuant to 28 U.S.C. 2281 *et seq.*, held that the regulation and policy administered by defendants violate the equal protection clause and entered judgment requiring, *inter alia*, that plaintiff's abortion be paid for under Medicaid. 383 F. Supp. 1143 (D. S.D. Sept. 24, 1974). On appeal by the defendants, Docket No. 74-684, this Court on March 17, 1975, vacated the judgment and remanded for further consideration in light of *Hagans v. Lavine*, 415 U.S. 528, 543-545 (1974), for adjudication of plaintiff's claim that the challenged regulation and policy violate the federal Medicaid statute, 42 U.S.C. 1396 *et seq.*; *Westby v. Doe*, 420 U.S. 968 (1975).

Upon remand, the three-judge district court gave consideration<sup>1</sup> to plaintiff-appellee's argument that the federal Medicaid statute requires payment for nontherapeutic abortions, and, relying upon *Doe v. Beal*, 523 F.2d 611 (3d Cir. 1975) (Petition for certiorari docketed, No. 75-554),<sup>2</sup> held that:

... South Dakota, in extending medical aid for full term deliveries and also for therapeutic abortions, has determined, in its discretion, that pregnancy is a condition for which medical treatment is necessary within the meaning of Title XIX, and it cannot decline to finance nontherapeutic abortions without violating the requirements to Title XIX. *Doe v. Westby*, 402 F.Supp. 140, 143-144 (D.S.D. Sept. 29, 1975).

In addition, the three-judge court incorporated into its September 29, 1975 decision its earlier holding that:

<sup>1</sup> Upon receiving the mandate of this Court, the three-judge court ordered the parties to submit further briefs on the statutory issue. In its September 29, 1975, Memorandum of Decision and Order, the three-judge court, "in the interest of judicial economy and efficiency," appropriately considered the statutory claim itself without further hearing rather than remanding the matter to the single judge. In doing so, the court noted that at the outset of the case, the single judge "did defer to the three-judge panel which, after appropriate hearing, made its findings on the facts in the case. Additionally, both the statutory and constitutional issues have been fully argued to the three-judge court, and it has jurisdiction to consider the statutory claim. See *California Department of Human Resources v. Java*, 402 U.S. 121 (1971); *Rosado v. Wyman*, 397 U.S. 397 (1970); and *King v. Smith*, 392 U.S. 309 (1968); in addition to *Hagans v. Lavine*, *supra*." *Doe v. Westby*, 402 F.Supp. 140, 142 (D.S.D. Sept. 29, 1975).

<sup>2</sup> In *Beal v. Doe*, Supreme Court Docket No. 75-554, the Court of Appeals for the Third Circuit held that the Pennsylvania policy and regulation refusing payment for nontherapeutic abortions contravene the federal Medicaid statute. The court of appeals did not reach the constitutional issue. Thus the statutory issue presented in *Beal* is precisely the same as presented herein; however, the instant case, unlike *Beal*, also raises the constitutional issue since the district court's decision herein is based both on statutory and constitutional grounds.

. . . the State of South Dakota, in providing Medicaid benefits to those eligible pregnant women who choose to carry their pregnancies to term and those who receive therapeutic abortions and deny Medicaid benefits to those eligible women who elect on the medical judgment of their physician a constitutionally protected nontherapeutic abortion as defined in *Roe v. Wade*, 410 U.S. 113 (1973), has created a classification which is in violation of the Equal Protection Clause of the Fourteenth Amendment . . . 402 F.Supp. at 144.

Thus, on both statutory and constitutional grounds, the district court entered judgment that plaintiff-appellee is entitled to Medicaid payment covering the cost of her nontherapeutic abortion and issued its injunction. From that judgment, defendants again appeal.

#### B. Facts.

The three-judge district court rendered its decisions upon cross-motions for summary judgment. The facts established by the record and found by the district court (383 F. Supp. at 1144-1145 and 402 F.Supp. 141-142) are:

1. At the time the complaint was filed, plaintiff, Jane Doe, was eight weeks pregnant and the unmarried mother of four children ages ten, nine, eight, and four.<sup>3</sup> She was the recipient of Aid to Dependent Children under the federal-state program administered pursuant to the Social Security Act of 1935, 42 U.S.C. § 601 *et seq.* She was also eligible for medical assistance (medicaid) under Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.*

bered 3 and 4 herein.) Plaintiff, who appears under an assumed

<sup>3</sup> (The district court's footnotes, set forth in full, are renumbered, was a married woman at the time of the birth of her children.

2. A pregnancy is a condition which requires medical care.

3. In South Dakota the medicaid program is administered by the Defendant Frithjof O.M. Westby, who, in his position as Secretary of Social Services, is by statute the head of the Department of Social Services. Included in the Department of Social Services is a Division of Social Welfare. The head of the division is Defendant Vern Woodard.<sup>4</sup> Plaintiff in consultation with her physician, decided to terminate her pregnancy. Termination was not "medically necessary",<sup>5</sup> but was desired by the plaintiff because she felt she was unable to care for another child, and an abortion would be in her "best interest". She did not have the financial resources to pay for an abortion and was advised by the defendants, or their agents, through her attorney, that an elective abortion was not covered under the Medical Assistance Program and medicaid would not pay for her abortion.

4. Rule 28D.210 of the South Dakota Department of Social Services provides:

"Physician services not covered under the Medical Assistance Program are as follows:

1. Any items or services which are not reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member."

Pursuant to the foregoing rule, defendants will not extend medicaid to cover payment for a nontherapeutic abortion

<sup>4</sup> See South Dakota Compiled Laws Chapter 1-36.

<sup>5</sup> The district court also uses the term "nontherapeutic" to describe plaintiff's abortion; the defendants' regulations and policy deny payment unless the abortion is deemed to be "medically necessary," that is, necessary to preserve the life or health of the woman. See Plaintiff's Interrogatories to Defendants in the Record.

for one otherwise qualified for medicaid, but will authorize payment for an abortion when the claim is accompanied by a written medical report indicating that a therapeutic abortion is necessary.

5. Under the South Dakota program a pregnant medicaid recipient who chooses to carry her pregnancy to full term is given "any medical care that would be required in connection with the delivery of a child up to thirty days hospitalization of the mother and child and unlimited doctor care and services."

6. At about the twelve week point of her pregnancy, plaintiff secured an abortion from her physician. Plaintiff remains indebted to the physician for his services.

### III. ARGUMENT

#### **A. The Statutory Question Presented Is So Unsubstantial as Not to Require Further Argument Because the District Court Was Clearly Correct in Holding That the Federal Medicaid Statute Requires Payment for Nontherapeutic Abortions.**

On the statutory claim, the question presented is precisely the same as in *Beal v. Doe, supra*, in which this Court on December 15, 1975, invited the Solicitor General to express the views of the United States as to whether or not Title XIX of the Social Security Act requires payment for nontherapeutic abortions. If the Pennsylvania welfare officials' petition for certiorari is denied in *Beal v. Doe*, then summary affirmance is appropriate in the appeal in the instant case.

The district court herein adopted the reasoning of the Court of Appeals for the Third Circuit in *Beal, supra*, which is based upon the well-accepted premise that pregnancy is a medical condition for which medical treatment is necessary. In examining the federal Medicaid statute,<sup>6</sup> the district court found that it does not authorize a state to refuse to pay for abortion because such a policy would not promote the statutory objectives: (1) to economize, 42 U.S.C. 1396a(a)(30), or (2) to protect the best interests of recipients, 42 U.S.C. 1396a(a)(19), since de-

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<sup>6</sup> The State of South Dakota participates in the federally-funded program of medical assistance to the indigent, "Medicaid," established by Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.* All states participating in Medicaid must provide at least certain basic services [physician services, hospital services, nursing home services and X-ray and laboratory services, children's health screening and family planning services, 42 U.S.C. §§ 1396a(a)(13), 1396d(a)(1)-(5)] to at least all recipients of Aid to Families with Dependent Children, 42 U.S.C. § 601 *et seq.*, and Supplementary Security Income, 42 U.S.C. § 1381 *et seq.*, [42 U.S.C. § 1396a(a)(1)(A)]. The South Dakota Medicaid program, administered by defendants and their agents, provides medical assistance to the welfare recipient, which includes Plaintiff Jane Doe.

livery is often physically or psychologically more harmful to women than abortion. Moreover, the district court held that 42 U.S.C. 1396a(a)(10)(B) *requires* states to provide the same amount and scope of services to all classes of recipients. (402 F.Supp. at 143). Since the State of South Dakota does not impose upon other Medicaid recipients seeking medical care the requirement that they choose the "least voluntary method of treatment," it cannot impose this condition upon Medicaid recipients seeking to terminate their pregnancies by abortion.

Although two courts of appeals<sup>7</sup> have held that the Medicaid statute does not require payment for abortion, their reasoning is incorrect because: (1) it is based upon an incomplete analysis of the legislative history of the Medicaid statute and fails to consider the history of a recent amendment to the Act<sup>8</sup> in which Congress declined to prohibit payment for nontherapeutic abortions; and (2) it does not examine the section of the Medicaid statute<sup>9</sup> which the Third Circuit in *Beal* correctly held requires payment for abortion. The district court herein appropriately applied the Third Circuit's analysis. This case thus raises no substantial issues which require full argument before this Court and, accordingly, should be summarily affirmed.

**B. The Principles Upon Which the Constitutional Decision Below Is Based Are So Well Established That Further Argument Is Unnecessary.**

The three-judge district court herein, as noted, based its injunctive order both on the requirements of the federal Medicaid statute and on the Fourteenth Amendment, incorporating its

<sup>7</sup> *Roe v. Norton*, 522 F.2d 928 (2d Cir. 1975) and *Roe v. Ferguson*, 515 F.2d 279 (6th Cir. 1975).

<sup>8</sup> 42 U.S.C. 1396d(a)(4)(c).

<sup>9</sup> 42 U.S.C. 1396a(a)(10).

earlier decision reported at 383 F.Supp. 1143. All courts squarely faced with the issue have decided that the Constitution prohibits states participating in Medicaid from refusing to pay for lawful nontherapeutic abortions where such states choose to pay for prenatal care and delivery.<sup>10</sup>

Even if this Court determines that the federal Medicaid statute does not require payment for abortion, the Court can affirm the district court's decision on constitutional grounds, since the constitutional principles involved are so well established that further argument is superfluous.

**1. *Roe v. Wade* and *Doe v. Bolton* control the decision in the instant case. The challenged regulation and policy clearly violate the equal protection clause.**

In *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), this Court interpreted the right of privacy to include a woman's decision, in consultation with her physician, whether or not to terminate her pregnancy by abortion. This Court held that the state could not interfere with a woman's constitutionally protected right to choose abortion, absent a compelling state interest, and found that in the first trimester of pregnancy no such interest exists, while in the second trimester the state has an interest only in protecting the woman's health. 410 U.S. 113, 163-164. In *Doe v. Bolton*, this Court also invalidated certain restrictions imposed by state law upon the decision made by the pregnant woman in consultation with her physician, including restriction of abortions to accredited

<sup>10</sup> *Doe v. Rose*, 499 F.2d 1112 (10th Cir. 1974); *Wulff v. Singleton*, 508 F.2d 1211 (8th Cir. 1974), *cert. granted*, 43 U.S. L.W. 3674 (1975); *Doe v. Rampton*, 366 F.Supp. 189 (D. Utah 1973); *Smith v. Tinder*, — F. Supp. — (D. W. Va. No. 75-0380CH, August 8, 1975) and *Doe v. Myatt*, (D. N.D. No. A3-74-48, January 27, 1975 and October 30, 1975).

hospitals, 410 U.S. at pp. 193-195, a requirement that abortion be approved by a hospital committee, 410 U.S. at pp. 196-198, and a requirement that two physicians concur in the abortion decision, 410 U.S. at pp. 198-199.

The court below held that once a state chooses to pay for medical services rendered in connection with the pregnancies of some Medicaid eligible women, it cannot refuse to pay for medical services rendered in connection with the pregnancies of other Medicaid eligible women who elect abortion, because the right to choose abortion involves a fundamental right, and the state can constitutionally discriminate between two similarly situated groups of pregnant Medicaid women only if it can produce a compelling state interest to do so. The district court correctly determined that the state has no such interest; as the court said:

. . . (A)ll pregnancies must terminate. The policy reflects the moral judgment of the State that the pregnancies must terminate only by birth of a child or for therapeutic reasons. This moral judgment is not a compelling state interest which would justify inhibiting a woman in her exercise of a fundamental personal right as defined in *Roe and Doe*. 383 F. Supp. at 1146.

**2. Once the state chooses to provide medical care for pregnant women, it cannot place unconstitutional conditions upon the exercise of that entitlement.**

In the instant case, South Dakota has conditioned plaintiff's ability to receive Medicaid benefits during pregnancy—a statutory entitlement<sup>11</sup>—upon the decision not to terminate her pregnancy by abortion. Thus, the state would only allow plaintiff to receive medical care under Medicaid for her pregnancy

<sup>11</sup> 42 U.S.C. 1396 *et seq.*

if she forfeits her constitutional right to choose abortion. To receive any Medicaid services for pregnancy, she must carry it to term. While not absolutely prohibiting plaintiff and her class from receiving prenatal care or abortions financed from other sources, the Medicaid policy serves to deter and discourage pregnant Medicaid-eligible women from exercising their constitutionally protected choice.

The constitutional doctrine that a state may not condition receipt of statutory benefits upon forfeiture of constitutional rights is well established in a line of cases from *Sherbert v. Verner*, 374 U.S. 398 (1963). See also, *Perry v. Sinderman*, 408 U.S. 193 (1972); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Comment, Another Look at Unconstitutional Conditions*, 117 U.Pa.L.Rev. 144 (1968).

The analogy of the *Sherbert* and *Maricopa County* cases to the instant case is obvious and striking. In *Sherbert*, the plaintiff was required to forego her constitutional right to free exercise of religion in order to obtain statutory unemployment insurance benefits; in *Maricopa County*, the patients were required to abandon their constitutional right to travel in order to receive statutory medical services. Likewise, Plaintiff Jane Doe must forego her constitutional right to choose an abortion if she wishes to receive any medical care for her pregnancy. It is true that plaintiff is free to procure an abortion if she can afford to pay for it, just as Mrs. Verner was free to exercise her religion if she could afford to survive without unemployment insurance, or the patient in *Maricopa County* was free to travel if he could afford to pay for medical care. In *Maricopa County* this Court invalidated a residency requirement for medical care upon the remote and only possible deterrent effect which the state's denial of medical services might work upon the fundamental constitu-

tional right to travel, 94 S.Ct. at 1082.<sup>12</sup> In the instant case, defendants' policy of refusing to pay for abortion under Medicaid very clearly and very directly denies Plaintiff Jane Doe her freedom to choose an abortion, a constitutionally protected choice deriving from her fundamental right to privacy.

Plaintiff Jane Doe would again emphasize, as did this Court in the *Maricopa County* case, that the state is not required to provide any medical care for pregnant women. However, having once chosen to provide such care, the state cannot condition the receipt of its benefits upon the sacrifice of the woman's constitutionally protected right to choose the manner in which her pregnancy will terminate.

#### IV. CONCLUSION

The district court herein correctly applied established principles of statutory construction and constitutional analysis, and therefore this Court should affirm the judgment below without further argument. Even if this Court rejects the contention advanced here and in *Beal v. Doe, supra*, that the federal Medicaid statute requires payment for voluntary abortions, the constitutional basis for the decision below is so clearly correct that summary affirmance is appropriate. While each ground, statutory and constitutional, provides an independent basis for affirming the judgment in this case, the Court may prefer to affirm solely

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<sup>12</sup> The *Maricopa County* case is particularly significant to the case at bar in that it establishes that the right to obtain health care (even non-emergency health care) is a "basic necessity of life" to an indigent person. Programs providing health care benefits are essential, and of "greater constitutional significance" than other government benefit programs. Moreover, this Court rejected fiscal and administrative convenience arguments advanced by the State to justify the unconstitutional condition placed upon the receipt of such services.

on the statutory ground, and to deny the petition for certiorari in *Beal*, in order to avoid the constitutional question that would otherwise be presented.

Respectfully submitted,

MICHAEL A. WOLFF  
Black Hills Legal Services  
714 4th Street  
Rapid City, South Dakota 57701

PATRICIA BUTLER  
National Health Law Program  
10995 LeConte Avenue  
Los Angeles, California 90024

Attorneys for Appellee